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March 5, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 16, 2008

Case Number: TSO-0677

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be granted.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office (LSO) discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns.

On August 5, 2008, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (k) and (l) (hereinafter referred to as Criteria F, K and L, respectively). 2/

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion F relates, in relevant part, to information that a person "[deliberately misrepresented, falsified, or omitted significant information from . . . a Questionnaire for Sensitive National Security Positions . . ." 10 C.F.R. § 710.8(f).

(continued...)

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented the testimony of two witnesses - his pastor and his supervisor. He also testified on his own behalf. The DOE counsel did not present any witnesses. Both the individual and DOE submitted a number of written exhibits prior to and during the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

2/ (...continued)

Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k). Criterion L relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security" 10 C.F.R. § 710.8(l).

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites three potentially disqualifying criteria as bases for denying the individual's security clearance, *i.e.* Criteria F, K and L. To support its reliance on Criterion F, the LSO points to inconsistencies between the individual's response to the illegal drug question on his 2006 Questionnaire for National Security Positions (QNSP) and his responses regarding his illegal drug use during a 2007 Personnel Security Interview (PSI). Specifically, on the individual's 2006 QNSP, he certified that he only used marijuana three or four times from July 1988 to January 1990. Despite this certification, during a PSI conducted in October 2007, the individual admitted using marijuana approximately 100 times from 1972 to 1991, and that he used the drug once a month over a 19-year period. In addition, on the individual's 2006 QNSP, he certified that he never had a clearance or access authorization denied, suspended, or revoked. However, during the individual's 2007 PSI, he admitted that his clearance was revoked in 1990 or 1991 after he tested positive for marijuana. Finally, on his QNSP, the individual failed to list terminations from three employers for taking company property.

From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House.

The LSO's Criterion K concerns are predicated on the individual's illegal drug use at various times between 1972 and 1991. In particular, the LSO cites the individual's admission to using marijuana 100 times between 1972 and 1991, using hashish one time in 1973, using marijuana prior to going to work six or seven times between 1973 and 1974, and failing a drug test while holding a security clearance.

There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules and regulations. *See id.* at Guideline H. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness is questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO alleges that the individual used illegal drugs while holding a DOE security clearance between 1972 and 1991. The individual's use of illegal drugs in express contravention of DOE's policy against using illegal substances in all situations, especially while holding a security clearance, calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E. In addition, the LSO alleges that the individual was terminated by three employers for taking company property without proper authorization. These incidents also raise questions about the individual's judgment and reliability. *Id.*

IV. Findings of Fact

The relevant facts in this case are not in dispute. The individual was granted an access authorization in July 1970. *See* DOE Exhibit 6. His access authorization was terminated (not for cause) in January 1971 and reinstated in January 1976. *Id.* The individual's access authorization was terminated again in November 1982 (not for cause) and reinstated in November 1983. *Id.* In May 1990, the individual's access authorization was terminated, this time for cause as a result of testing positive for illegal drugs. *Id.* According to the individual, he failed the drug test due to second-hand smoke after attending a concert. The LSO requested a reinstatement of the individual's access authorization in May 2006. *Id.* As part of a routine background investigation, the individual completed a Questionnaire for National Security Positions (QNSP). *See* Ex. 5. Question 24(b) on the QNSP asks, in pertinent part,: "Have you ever illegally used a controlled substance while . . . possessing a security clearance . . ." *Id.* The individual responded affirmatively to the question certifying that he only used marijuana three or four times from July 1988 to January 1990. *Id.* In addition, on this QNSP, the individual certified that he never had an access authorization denied, suspended or revoked. *Id.* Finally, the individual did not list terminations from three employers for taking company property. *Id.*

In October 2007, the LSO asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve various security concerns. This PSI did not resolve concerns regarding falsification issues and the individual's illegal drug use. During this PSI, the individual provided inconsistent information by admitting that he used marijuana approximately 100 times from 1972 to 1991, and that he used marijuana once a month over a 19-year period. The individual also provided inconsistent information by admitting that his clearance was revoked in 1990 or 1991 after he tested positive for marijuana.

During the October 2007 PSI, the individual admitted using marijuana prior to going to work six or seven times between 1973 and 1974. He also admitted that he used illegal drugs and failed a drug test while holding a security clearance. *See* DOE Exh. 4.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that

granting the individual's security clearance would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Criterion F

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual's misrepresentations was serious. The individual's lack of candor concerning an area in his life that could increase his vulnerability to coercion or blackmail raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f).

During the hearing, the individual was questioned about his falsifications regarding his illegal drug use on his 2006 QNSP. He testified that he failed to disclose the actual amount of marijuana he used, stating that "I was afraid to admit that I did use [marijuana] quite a bit, not quite a bit but I used it a whole lot more than three or four times." Transcript of Hearing (Tr.) at 59. The individual admitted that he should have been more honest about his marijuana use. *Id.* When asked whether he intentionally lied to DOE on his QNSP, the individual responded that "I didn't lie . . . I just didn't tell the complete truth about how much I used it." *Id.* The individual further testified that most of his drug usage occurred about 15 years ago "when I was doing all my wild partying . . ." after which he realized that he needed to "straighten" his life out. *Id.* at 61. He testified that during this period, around 1989, he still used marijuana occasionally, which is why he stated that he only used marijuana three or four times from July 1988 to January 1990. *Id.* at 62.

During the hearing, the individual was also asked why he failed to report having an access authorization denied, suspended or revoked. *Id.* at 62. He explained that when he left DOE after testing positive for marijuana in 1990, his subsequent employer told him that he checked with DOE and that his security clearance had not been "revoked," but rather that the individual was placed on "administrative leave over there." *Id.* at 63. However, the individual did not present the testimony of this employer to verify his explanation. When questioned why he failed to list terminations from three employers for taking company property, the individual testified that, with respect to one employer, he was not terminated but rather he resigned from his position. *Id.* at 65. He further stated that after violating company policy, he either had to quit or get fired from this job. *Id.* at 66. The individual admitted that maybe he should have listed it, but he did not. However, he stated that he did not intentionally withhold information from DOE. *Id.* The individual attempted to explain the LSO's allegation that he was terminated from three employers for taking company property. He testified that in all three instances he was treated unfairly. *Id.* at 36. On the first occasion, the individual explained that a supervisor told him he could have an old cabinet that had been thrown away. *Id.* at 37. According to the individual, the cabinet had been discarded and sitting in a dumpster for about six days. *Id.* He explained that the company was cleaning and discarding old furniture and other items when his supervisor told him he could have it. *Id.* The individual testified that he was given permission to use the company forklift to retrieve the cabinet. However, he was

later told that he was not given permission to take the cabinet and was fired. *Id.* Similarly, on the second occasion, the individual testified that a supervisor told him he could have galvanized union fittings that were no longer being used. *Id.* at 42. He testified that he was stopped at the security gate when he left work and was told that he did not have written authorization to take the fittings home. *Id.* at 44. According to the individual, when he was called into Human Resources the next day, his supervisor denied that he told him he could have the fittings and he was fired. *Id.* The individual stated that he believed his supervisor wanted a family member to fill his position. *Id.* at 46. Finally, on the third occasion, the individual testified that he took a couple of shoe pads out of an old display case that was no longer being used. *Id.* at 48. According to the individual, he planned on cutting the shoe pad for his foot because he had a blister. *Id.* The individual testified that he was questioned by a supervisor as to why he took the shoe pads and he explained what he was going to do with them. *Id.* at 51. He further stated that he never left the employer's property with the pads, but was nevertheless told that he could not be trusted and was subsequently terminated. *Id.* Again, the individual suggested that there must have been a "hidden" reason behind his termination because, prior to this incident, the individual had no problems with his employer and had been trusted to secure thousands of dollars in the company's safe.

In a number of decisions, DOE Hearing Officers have considered the implications of falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to admit his falsifications; the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327 (2000) (less than a year of truthfulness insufficient to overcome long history of falsification); *Personnel Security Hearing*, Case No. VSO-0289 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use); *Personnel Security Hearing*, Case No. VSO-0037 (1995) (voluntary disclosure by the individual). 3/

After considering all the evidence before me, I find that the individual has failed to mitigate the security concerns arising from his omissions about his marijuana use, his clearance being revoked and his terminations from three employers for taking company property. Although the individual testified that he understands the importance of being completely honest with DOE and that he did not intentionally misrepresent information, I find his explanations for the misrepresentations to be unpersuasive. First, the individual's willingness to conceal information from the DOE in order to avoid adverse consequences is an action that is simply unacceptable among access authorization holders. In addition, the individual did not voluntarily report his misrepresentations. The individual admitted his significant marijuana use, his security clearance revocation and his terminations for taking company property during the course of an October 2007 PSI. If the individual had not been interviewed at that time, there is no indication in the record that he would have come forward voluntarily to correct his falsifications. Second, the individual maintained his falsifications for over a year, from the time he signed his QNSP in 2006 until his October 2007 PSI. Third, the

3/ Decision issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm> ."

falsifications are recent. Fourth, the individual acknowledged during the hearing that he was not completely forthcoming about marijuana usage. Fifth, during the period that the individual maintained the falsehoods, the individual was vulnerable to blackmail, pressure or coercion. Sixth, at the time of his falsifications, the individual was a mature adult. Finally, with respect to the individual's explanation about the revocation of his security clearance in 1990, the individual failed to present corroborating testimony that his security clearance was not revoked as he alleged. Had the individual provided corroboration for this statement through witness testimony, he might have allayed this security concern under Criterion F. Absent corroboration, I cannot find mitigation here. Likewise, with respect to the individual's explanations regarding terminations from three employers for taking company property, I find it troubling that the individual was not forthcoming regarding these terminations on his 2006 QNSP even though he did not believe they were justified. I also find it difficult to believe that on three separate occasions with three separate employers that the individual was without fault in taking property that did not belong to him. For all the foregoing reasons, I find that the individual has failed to mitigate the security concerns raised by Criterion F.

B. Criterion K

The individual testified that he has not used illegal drugs for 15 years and never intends to use them again. Tr. at 24. He explained that illegal drugs destroyed his life and that he decided to change his life for the better by disassociating from people who used drugs, going to church, getting married and having a family. Tr. at 24-28. The individual further explained that he is more mature now and looks back at what happened in his past as "stupid" mistakes. *Id.* at 34. The individual's pastor provided compelling testimony that the individual is a trustworthy individual who is dedicated to his family. *Id.* at 11. He testified that the individual has talked to him about his past drug usage and that the individual "does not act like a person who uses drugs." *Id.* The individual's supervisor similarly testified that the individual is an honest person and is not aware of any drug usage by the individual. *Id.* at 17-18.

As an initial matter, I find that the individual's last drug use is not recent and that its seriousness has been mitigated by the passage of time. The circumstances under which the individual used marijuana, however, are troubling. The individual was 40 years old and had been a DOE security clearance holder when he tested positive for marijuana in 1990. *Id.* at 24 and 31. The individual's lapse in judgment at this time in his life certainly cannot be ascribed to his immaturity the time. Furthermore, his lapse in judgment regarding his drug usage is serious given that he was well aware of the illegality of his actions.

Nevertheless, the individual convinced me through his testimony and that of his witnesses that there is little likelihood that he will use illegal drugs again. The individual convincingly testified that he is a changed person since he stopped using drugs. He also convincingly testified that he is dedicated to his family and does not associate with persons who are involved in illegal drugs. *Id.* at 27. The individual's current behavior demonstrates that he is now comporting himself in an honest, trustworthy and responsible manner. After carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented compelling evidence which mitigates the Criterion K security concerns at issue.

C. Criterion L

To mitigate the Criterion L concerns, the individual presented the testimony of his pastor and supervisor, both of whom testified that the individual is an honest, trustworthy person. During the hearing, the individual admitted that he used marijuana while holding a security clearance. However, he stated that his life has changed dramatically with respect to drugs. *Id.* at 24. He no longer uses drugs and admitted that he understands the seriousness of DOE security concerns. However, these Criterion L concerns raise serious questions about the individual's honesty, reliability and trustworthiness. In evaluating the evidence on this matter, I considered that the individual's violation of criminal law and DOE policy occurred about 15 years ago. I also considered that the individual provided possible explanations for his terminations by three employers for taking company property without proper authorizations. Against these positive factors are the following negative ones. First, the use of illegal drugs while holding a DOE security clearance is a very serious matter. Second, the individual was a mature person when he used illegal drugs and should have understood that his use of drugs while in the possession of a security clearance posed a risk to national security. Third, although the individual provided possible explanations for his terminations for taking company property, I was not convinced that he was completely without fault with regard to his three terminations. Again, absent corroboration of the individual's explanations, I cannot find mitigation here. In the end, I must err on the side of national security with regard to these issues before me and find that the individual did not present compelling evidence to mitigate the Criterion L concerns.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F, K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criterion K. However, I find that the individual has not brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: March 5, 2009